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Scott Brigham By Frank E. Brigham, Guadian Ad Litem v. Moon Lake Electric Association, Inc. : Brief of Appellant Scott Brigham, By Frank E. Brigham, Guardian Ad Litem

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Brigham, Gunn

MOON LAKE
ATION, INC.

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IN THE SUPREME COURT OF THE STATE OF UTAH

SCOTT BRIGHAM, by Frank E. Brigham, Guardian ad litem,
Appellant,

vs.

MOON LAKE ELECTRIC ASSOCIATION, INC., a Utah corporation,
Appellee,

Case No. 11869

BRIEF OF APPELLANT SCOTT BRIGHAM, by FRANK E. BRIGHAM, GUARDIAN AD LITEM

NATURE OF THE CASE

On June 28, 1968, Frank E. Brigham and three of his sons, Michael, Steven and Scott, along with Stephen Croft, a neighbor boy, left Salt Lake on a camping trip. The purpose of their expedition was to search for arrowheads. They spent the night at a campsite east of Roosevelt near Fort Duchesne in Uintah County. The next morning they arose, ate breakfast and began their search. They spread out, leaving some distance between each person, so as to cover a larger area of ground,

and climbed a small mesa in the neighborhood of the campsite. (Tr. 12-18).

A power pole, located on top of the mesa, carrying Moon Lake's transmission lines had rotted, broken and fallen to the ground. The power lines lay on or near ground level. As he approached the downed lines, Michael, a boy of about 15, noticed two wires, both rather taut and not very far off the ground. As he stopped to go under the wires, he bumped into one of the lines with his forehead (Tr. 242). Scott, then about age 10, asked his brother if the wires were live (Tr. 242). According to defendant's evidence, Michael answered to the effect that the wires did not contain any electricity (Tr. 242). As he ducked to go under the wires, Scott came in contact with a live wire from which he received an electrical shock, causing burns and rendering him lifeless. (Tr. 136). He was saved only through the expeditious application of artificial respiration by his father (Tr. 19-21). Immediately thereafter, Scott was rushed to the hospital in Roosevelt, where he was treated and released (Tr. 23). As a result of his contact with the electric power line, Scott received severe, though localized, burns requiring extensive treatment, including rather delicate skin grafting operations (Tr. 138-145, 160).

DISPOSITION IN THE LOWER COURT

The case was submitted to the jury on interrogatories which were answered as follows:

> "We, the jury, find the following answers to questions put to us:

1. Were the employees and agents of the defendant Moon Lake Electric Association negligent in maintaining the electric transmission line?

Yes

(yes or no)

2. If your answer to question No. 1 is 'yes', then answer the following question:

Was such negligence a proximate cause of the injury to the plaintiff Scott Brigham?

Yes

(yes or no)

3. Was the plaintiff Scott Brigham negligent in coming in to contact with the electric transmission line? Yes

(yes or no)

4. If your answer to question No. 3 is 'yes', then answer the following question:

Was such negligence a proximate cause of the injury to the plaintiff Scott Brigham?

Yes

(yes or no)

5. What sum of money would compensate plaintiffs for special damages? $736.80

6. What sum of money would reasonably compensate plaintiff Scott Brigham for general damages? $2,500.00" (Tr. 161).

A judgment of no cause of action was entered against plaintiff based upon the finding of contributory negligence. This appeal is prosecuted from that judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment entered by the trial court and remand for a new trial.

ARGUMENT

POINT 1. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY AS TO THE EXTENT OF DEFENDANT'S LIABILITY.

(a) The correct rule is strict liability in situations like that presented in the present case.

The court at trial instructed the jury that the defendant should only be liable if defendant was negligent in allowing the power pole to rot and fall. Plaintiff submitted a requested instruction (R. 123), which was denied, asserting that utility companies should be strictly liable when, because of defects exclusively under their control, injuries occur and losses result. Appellant submits that the rule of law contained in the rejected instruction is the rule imposed by the statutes of Utah, that it is the better rule, that this Court should so rule, and that the case should be remanded with instructions that the defendant in this case is strictly liable for all injuries resulting from the defective pole and transmission line.

Section 54-7-22 of the Utah Code Annotated (Rep. vol. 1953) states:

> "(1) In case any public utility shall do or cause or permit to be done any act, matter or thing prohibited, forbidden or declared to be un-

lawful, or shall omit to do any act, matter or thing required to be done, either by the Constitution or any law of this State or by any order or decision of the commission, such public utility *shall be liable to the persons affected thereby for all loss, damages or injury caused thereby or resulting therefrom,* and if the court shall find that the act or ommission was wilful, the court shall, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person.

(2) No recovery as in this section provided shall in any manner affect a recovery by the state of the penalties in this title provided." (Emphasis added.)

The Utah Public Service Commission, the regulatory body overseeing the operation of power companies, has adopted by Order No. 54 with Supplemental Order No. 2 on the 26th of March, 1963, Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines, Handbook 81, (1961) as published by the U. S. Department of Commerce, National Bureau of Standards. Section 213 (A) (2) (Page 44) of Handbook 81 states:

> "Lines and equipment shall be *systematically inspected* from time to time by the person responsible for the installation." (Emphasis added.)

The record clearly shows that defendants had no *systematic* program for inspecting their power lines (Tr. 64, 84). Occasionally an airplane would fly over the power lines to see if any power poles were down (Tr. 85-87). The flights were usually made only after wind-

storms, heavy snow storms, deer season or similar occurrences when the power company might expect to have problems with their power lines. Except for a visual inspection after a pole had been removed, the company made no inspection of the poles themselves to see if they were sound and fit. Pole removal, of course, was carried out on a very irregular and intermittent basis. For poles that were left in the ground, there was no actual program of regular inspection (Tr. 83-88).

Such sporadic and ineffective inspection as was conducted by defendant does not meet the requirement that lines shall be "systematically inspected from time to time." Because Section 54-7-22 imposes liability, irrespective of negligence or fault, for any violations of the rules prescribed by the Commission, strict liability is the rule to be imposed upon a defendant for failure to follow the rules prescribed by the Commission.

The strength of the public policy embodied in Utah Code Annotated § 54-7-22 is reinforced and re-emphasized by § 54-7-25 U.C.A. (Rep. vol. 1953) This section provides in part:

> "(1) Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this title, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred nor more than two thousand dollars for each and every offense.

> "(2) Every violation of the provisions of this title or of any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, by any corporation or person is a separate and distinct offense, and, in case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense."

This statute imposes criminal penalties to the same extent § 54-7-22 imposes civil liabilities. The legislature has clearly indicated in two separate statutes that power companies shall follow the orders of the Public Service Commission; otherwise, they shall pay for their derelictions. The imposition of strict liability would not be radical and unjustified judicial legislation; on the contrary, such strict liability is the policy and the law of the State of Utah.

(b) Even if strict liability were not the rule imposed by statute, strict liability should be the rule imposed in a case like the present one.

Traditionally the courts have applied a very stringent and exacting negligence standard to describe the duty owed by power companies to those who might come in contact with high power lines. The courts have recognized that such a standard is only commensurate with the very grave risks of injury and death inherent in any installation transporting large amounts of electricity. The case of *Cornucopia Gold Mines v. Locken,* 150 F.2d 75 (9th Cir.), *cert. denied,* 326 U.S. 763 (1945) presented a fact situation very similar to the instant case. In *Locken,* plaintiff's decedent, a young woman, had wandered off a dirt road, had become entagled with sagging

transmission lines, which were dangerously near the ground, and was electrocuted. The evidence showed that the defendant had made very irregular inspections of the power lines. As to the defendant's duty to those who might become entangled within these power lines, the court stated:

> "We conclude that where as in this case the owner of such a transmission line wire negligently fails to inspect and repair it and allows it to become in disrepair and sag near and rest upon brush on the ground in wild unfenced mountainous mining country, so that one leaving a nearby road and walking near or over such transmission line would likely come in contact with it and thereby be injured, is guilty of wreckless conduct and wanton negligence rendering the owner liable for resulting personal injury, *whether or not the one injured was a technical or other kind of trespasser.*" (150 F.2d 77) (Emphasis added).

In *Locken* the court avoided defendant's defenses by calling defendant's conduct "wanton negligence." The court appeared to say that since defendant's conduct was so bad, he should not be able to shield himself with flimsy defenses. This is precisely the situation in the present case.

Though apparently never presented with facts squarely in point with the present case, the Utah Supreme Court has stated that power companies do have a very high duty of care indeed. In the case of *Toma v. Utah Power & Light Company,* 12 Utah 2d 278, 365 P.2d 788, 791 (1961), the Court stated:

> "The defendant in this case was engaged as a public utility furnishing electric power to a large number of customers. It was furnished various persons under different and peculiar circumstances. In all cases it is required to exercise the degree of care that a person of ordinary prudence would under the circumstances. It is well known that one dealing with electricity deals with a force of dangerous character and that there is a constant risk of injury to persons or property if not properly controlled. The care observed must be commensurate with and proportionate to the danger. Therefore, the defendant company was obliged to meet a high standard of care, which was greater in some cases than another depending on the exigency of the service rendered."

The courts have imposed upon those dealing in electricity a much higher standard of care than would be applied to those dealing in less dangerous articles. The law has rightly recognized that sound policy demands that power companies faithfully follow exacting and rigid safety requirements.

The general theory of tort liability seeks some way to divide losses. The negligence standard, conveying as it does some implication of fault, is a somewhat arbitrary but practical method of distributing losses where the law could not decide, without the presence of such a standard, where the losses should fall. In the vast majority of cases involving accidents and the need to distribute losses, the negligence standard makes sense. Unless one has some stronger reason for allocating the cost of accidents to one party or the other, fault seems to be a way to make such an allocation without being unduly ar-

bitrary. Through the use of the doctrine of contributory negligence, the law has taken the position, though by no means without doubts, that if both parties are at fault, then there is no real reason to impose liability on one party and thus distribute the loss.

However, when there are reasons for allocating the damages for injuries to one party or the other, irrespective of fault, then the rationale for the negligence standard no longer has much persuasiveness. When it is easy to decide where liability should lie, there is no need to resort to rules, which may be imperfect and questionable, to distribute those losses. Indisputably the cost of maintaining safe electrical transmission systems, portending no threat to human life, belongs upon power companies. Power companies should recognize and be responsible for the maintenance of the highest safety standards, and the law should not allow any deviations from the highest standards. Not to place these costs of safe transmission lines on the power companies is to allow them to avoid their normal costs of doing business. See Keeton, *Conditional Fault in the Law of Torts,* 72 Harv. L. Rev. 401 (1959).

The rule of negligence liability, when applied to cases such as the present one, gives to the power company a macabre decision. The power company can estimate what its costs due to liability lawsuits will be if it does not maintain proper safety standards. It can then balance those costs against the costs involved in maintaining rigidly controlled and inspected transmission lines. It may decide, however wrongly, that it is cheaper

to run the risk of liability lawsuit than to provide the kind of safety standards which will reasonably and adequately protect human life and prevent injury. The law should not allow power companies to make this choice. Sound public policy would dictate that the power companies recognize their responsibility to maintain the highest safety standards; the law should not leave them the option of gambling that they can reduce their legitimate costs because of the reluctance of jurors to grant awards or the unwillingness of parties to risk lawsuits.

The theory being advanced here, that damages for injuries resulting from defective installations are a cost of doing business, is neither novel nor revolutionary. The law has in several areas recognized the need for the imposition of strict liability. There are two areas of strict tort liability which have particular relevance for the case at bar: the ultrahazardous activities doctrine, which should apply to transmission of electricity, and the products liability area, which offers sound and persuasive policy reasons for imposing liability on the defendant in the case at bar.

The doctrine that one who engages in ultrahazardous activities does so at his peril has been recognized in Utah. In the case of *Madsen v. East Jordan Irrigation Company,* 101 Utah 552, 125 P.2d 794, 795 (1942), the Court stated:

> "It is conceded that the rule of absolute liability prevails when one uses explosives and the blasting of said explosives results in hurling of rock, earth or debris which causes injury to another."

Robison v. Robison, 16 Utah 2d 242, 394 P.2d 876, 877 (1964), another case dealing with explosives, recognized the rule:

> "[O]ne who uses or is responsible for a dangerous instrumentality is absolutely liable for any resulting damage."

In the case of *Southwick v S. S. Mullen, Inc.,* 19 Utah 2d 430, 432 P.2d 56 (1967), the Court restated its commitment to the rule of absolute or strict liability in blasting cases. The theory behind strict liability in the dangerous instrumentality area is quite simple. The risks of injury and the potential threat to human life are so great that the party who is performing the dangerous act should pay for all resultant damages and injuries. Having to pay for all resulting costs also compels those engaging in ultrahazardous activities to maintain the very strictest and highest safety standards. The law here is recognizing a "felt necesity" and insuring that the powers of the law will be used to enforce desirable social policy.

Electricity is obviously a very dangerous instrumentality. This is especially true when it is being carried through high voltage transmission lines. As was pointed out at trial by Mr. E. Ballard of the Moon Lake Electric Association, it is very difficult, if not impossible to protect human life when people come into contact with high voltage lines. Mr. Ballard was asked what protection to human life was actually built into the distribution system. His answer is significant:

> "Protection to human life that is built into the system is the actual standard of construction which means the mechanical strength of the poles

> and the elevation of the conductor above the ground and the separation, in other words, from ground and the ability of a person to come into contact with a conductor which becomes a physical thing in the construction." (Tr. 88).

Though not stated with imposing elegance, Mr. Ballard's point is well taken. The only way life can be protected when high power lines are involved is to keep the high power lines away from human beings. If the high power lines do come close to human activities, then the risks of injury and possible death become intolerably great; the duty rests upon the power company to insure that the power lines never come that close to the ground.

A second area where the principle of strict liability has been increasingly recognized is the products liability area. In his famous concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944), Mr. Justice Traynor outlined the theoretical bases for strict liability upon the manufacturer of defective consumer goods:

> "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing

> business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market, it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurence is a constant risk and a general one. Against such a risk there should be a general and constant protection and the manufacturer is best situated to afford such protection."

In the case of *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1962), the policies enunciated by Justice Traynor in the *Escola* case, *supra,* became accepted as law. There the court said:

> "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."

Recently the principle of strict liability for defective products has moved relentlessly forward to virtually unanimous approval by all courts who have been faced with the issue. One leading case which applied the doctrine is *Hennigsen v. Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A.2d 696 (1960), involving a defective steering wheel in an automobile. Recovery was allowed for a defective altimeter in an airplane in the case of *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81

(1963). Srtict liability was held to apply to live virus in polio vaccine in *Gottesdanker v. Cutler Laboratories,* 6 Cal. Rep. 320 (Cal. App. 1960). Recovery was allowed for a defective forkstem in *Putnam v. Erie City Mfg. Co.,* 338 F.2d 911 (5th Cir. 1964).

The products liability area indicates that it is proper to place the cost of imperfections in the product on those under whose control and inspection the defects are most easily found and remedied. Certainly the bottler of the defective soft drink should remedy the failures of his product. His options are: (1) he may throw out the defective material and replace it with satisfactory material, or (2) if he chooses to let the defective material pass in the market place, then he is responsible for any damage proximately resulting therefrom. Similarly, if a power company allows a defective pole to rot and fall to the ground, the cost of replacing that pole is clearly upon the utility company. It has the choice; it can either bear the cost of putting in the new poles and inspecting to insure that its poles are in good condition, or it can allow the pole to fall and pay for all damages proximately resulting therefrom. The products liability area also helps to give a satisfactory workable rule to be applied in this case: when, because of defects exclusively under the control or supervision of the defendant power company, the public comes in contact with the facilities of the company and serious or grave injury results therefrom, strict liability is the standard to be applied.

In addition, as with the manufacturer in the products liability area, it is the power company who is in

the best position to protect against the loss. The utility can, by procuring proper insurance, spread the loss throughout the general consuming public. For a minimal increase in the monthly electric bill, the losses which severely fall upon those who are injured can be compensated very cheaply and almost without notice by the general consuming public. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 Yale L. J. 499 (1961).

In other areas the law has recognized that there are certain situations where the duty to pay for damages belongs to one party and thus that party should be strictly liable. The law of trespass and the law of nuisance provide ancient and trenchant examples of strict liability. In both of these areas it has long been held that one who invades the property of another is liable for any damages resulting therefrom, without any showing of negligence on the part of the defendant. *Kinsman v. Utah Gas & Coke Company,* 53 Utah 10, 177 Pac. 418 (1918). See Prosser, Torts, 2d Ed., 336, 337; 54 A.L.R. 2d 766.

Thus, in summary, the normal negligence analysis is entirely inappropriate to the case before us. The cost of maintaining and inspecting the poles which carry high transmission lines is clearly a cost to be borne by the power company. If, through the defects in pole or transmission lines, injury results, there is no need to allocate losses. It is clear where the risk of loss belongs; it belongs to the power company. The lower court should have given plaintiff's requested instruction on strict liability. Failure to do so was fatal error. The judgment should

be reversed and the case should be remanded for trial on the proper legal theory.

POINT II. CONTRIBUTORY NEGLIGENCE IS NO DEFENSE TO AN ELECTRIC COMPANY AGAINST WHOM STRICT LIABILITY IS BEING IMPOSED.

Sound policy dictates that when strict liability is being imposed, the defendant's potential defenses should be severely restricted. Power companies have traditionally been subject to very high standards of care, standards of care which are often in practice indistinguishable from strict liability. The substantive difference between strict liability and the traditional negligence standards lies in the fact that the power company should no longer utilize the often flimsy defense of contributory negligence. It would make no difference to the power company whether its standard of care was negligence or strict liability, so long as the power company felt it still had the comfortable refuge of local juries largely drawn from among its customers and favorable to its case. To make the policy of strict liability effective and meaningful, the power company should not be able to assert the defense of contributory negligence.

In accordance with these policy considerations, the general rule is that the contributory negligence of the plaintiff is not a defense in cases of strict liability; this is true at least in those cases where the contributory negligence does not consist of voluntary exposure to a known danger. See Prosser, Torts, 2d Ed., page

341. The Utah Supreme Court has held that this is the rule applicable in Utah. In *Robison v. Robison, supra,* 394 P.2d 878, n. 8, the Utah Supreme Court said:

> "[T]he kind of contributory negligence that would consist of *voluntary exposure to a known danger,* and so amounts to an assumption of risk, is ordinarily a defense [to strict liability]. . . " (Emhasis added.)

In the case of *Evans v. Stewart,* 17 Utah 2d 308, 410 P.2d 999, 1002 (1966), Mr. Justice Crockett had this to say about the difference between contributory negligence and assumption of risk:

> "This further should be said in regard to the defense of assumption of risk. It is not identical with but is closely related to contributory negligence. *To invoke it and preclude recovery there must be a voluntary assumption of the risk of a known danger where one has a reasonable opportunity to make an alternative choice."* (Emphasis added.)

In the case of *Johnson v. Maynard,* 9 Utah 2d 268, 342 P.2d 884, 886 (1959), the distinction between assumption of risk and contributory negligence was delineated thusly:

> "In giving the foregoing instructions the trial court fell into the error of confusing the doctrine of assumption of risk with contributory negligence. While in some instances the phrase 'assumption of risk' is used in defining the rights of parties where both the plaintiff and defendant are charged with negligence, in such situations the rights and duties involved rest upon principles of

> negligence and contributory negligence. The doctrine of assumption of risk in many instances overlaps into the field of contributory negligence; but it must be distinguished and applied only in a proper case, that is, *when the question involves the reasonableness of plaintiff's voluntary action in the face of a known danger.*" (Emphasis added.)

The approach of these cases has much good sense to recommend it. Contributory negligence serves as a somewhat questionable way of distributing losses. In cases of strict liability, however, the problem of distributing losses is no longer present; the law has already imposed liability for losses upon the party who is strictly liable. On the other hand, strong arguments can be made that the plaintiff's conduct should be a defense to strict liability in those cases where the plaintiff's conduct shows that he has *knowingly* assumed the risk of the danger. See Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct,* 1968 Utah L. Rev. 267.

In the present case the record is absoluetly void of any evidence indicating that the plaintiff, Scott Brigham, voluntarily assumed a risk of any *known* danger. In fact, the evidence as shown by the record would strain all reasonable credibility to show even contributory negligence. At the very least, the case should be remanded, so that the jury might be instructed to make a proper finding as to whether or not the plaintiff was in fact assuming the risk of danger that day on the mesa.

POINT III. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A FINDING OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE.

(a) Defendant did not sustain its burden of showing plaintiff's contributory negligence.

The defense of contributory negligence precludes any comparison of the negligence of defendant with that of plaintiff. If the plaintiff is 5 percent negligent and the defendant is 95 percent negligent, then, the defense eliminates any recovery. This rule often yields harsh and unreasonable results. For this reason defendant has the burden of showing that plaintiff was contributorily negligent. As it was put in the case of *Ray v. Consolidated Freightways*, 4 Utah 2d 137, 289 P.2d 196, 200 (1955):

> "At the outset the mind of the fact trier is presumably *in equipoise on the question of whether the plaintiff was contributorily negligent. The burden is upon the defendant to overcome this balance and to impel his mind toward a conclusion.*" (Emphasis added.)

In the present case the defendant did little to disturb the equipoise that presumably existed in the mind of the jury. The only significant evidence presented by defendant as to plaintiff's contributory negligence came in the testimony of one E. Ballard, an employee of Moon Lake Electric Association. Ballard testified as to the substance of a conversation he had with young Scott the day of the accident:

> " . . . Scott indicated that he saw his older brother pick up a wire and walk under it and he asked him

> if it was a hot wire or an electric wire and got an answer, 'no', and apparently from the conversation the next thing he had his hand up against the conductor and he indicated to me that he reached up and touched the conductor . . . " (Tr. 242)

Asking his brother about the wires would indicate that Scott possessed more than normal foresight and concern for a boy of ten. His brother, in answering, was, as the record shows, confirming his own experience in having brushed one of the wires without adverse consequence. Reasonable men could not assume that boys the ages of Michael and Scott would know that one wire carried electricity while the other wire was harmless. Scott prudently relied on his older brother's advice and had no reason to be aware of any threatening danger.

During cross examination, Scott had trouble remembering the exact occurrences of the day of the injury. Counsel for defendant then brought out a copy of a deposition of Scott taken some seven months earlier (Tr. 194). In this deposition Scott stated that "people" had *told him* that he had asked Michael whether or not the wires were live and had been told that Michael either did not know or that he said they were not. As to details, Scott was very unclear in his own mind, as he could not remember an of the events and was only repeating what other people had told to him (Deposition of Scott Brigham R. 47). The substance of this deposition testimony was not presented to the jury. Only later during Ballard's testimony did the jury hear of this conversation, and then they were told that Scott had asked

Michael whether the wires were live and Michael had told him "no" (Tr. 242). This second version of the conversation was the only testimony which defendant offered to disturb the equipoise in the minds of the triers of fact. The evidence, viewed objectively, virtually compels the conclusion that Scott was not contributorily negligent. Appellant submits that there was no evidence in the record upon which the jury could base its finding of contributory negligence, and thus defendant did not sustain its burden of showing the contributory negligence of plaintiff.

(b) The evidence was insufficient to sustain a finding of contributory negligence against the plaintiff in the instant case.

The law is somewhat unsettled as to the application of the doctrine of contributory negligence to children. See 77 A.L.R. 2d 917. Some jurisdictions apply a presumption that children between the ages of 7 and 14 are not capable of contributory negligence (*e.g.*, Virginia, Louisiana, Mississippi and others. See 77 A.L.R. 2d 926-927); however, this presumption is rebuttable by evidence brought forward by the defendant to show that the child did in fact have such capacity. Most jurisdictions, including Utah, see *Kawaguchi v. Bennett,* 112 Utah 442, 189 P.2d 109 (1948), follow the rule that the standard of care to be applied in a particular case depends upon the standard of care reasonably to be expected under the same or similar circumstances from the ordinary child of like age, intelligence and experience. While this standard seems vague and elusive, it does at least provide a considerably lower standard of care

for children than is required of normal adults. The evidence in this case does not show that Scott had any reason to believe that the lines would cause him harm. Even if the evidence did so show, defendant's own evidence would counter-balance such evidence for at the critical time as he approached the wires Scott asked if the wires would cause him harm, and was told that they would not. It is difficult to see, in view of the state of the evidence, how reasonable men could conclude anything but that Scott had acted reasonably and with due care and caution for his own safety. The evidence does not support a verdict of contributory negligence.

CONCLUSION

Appellant submits that the judgment of the lower court should be reversed and the case remanded with instructions that defendant is strictly liable if plaintiff's injuries were in fact caused by defects in defendant's transmission system. Further, instructions should be given that plaintiff's contributory negligence is no defense to the defendant. Finally, appellant submits that the case should be reversed because the evidence is insufficient to support the verdict.

Respectfully submitted,

MULLINER, PRINCE & MANGUM
Gerald R. Miller
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